United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1517

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

HERBERT YAGID,

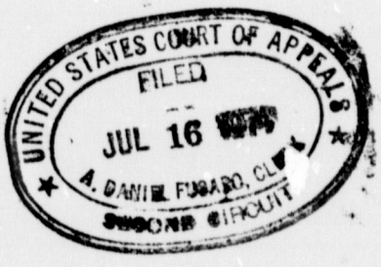
Appellant.

B
P/S

Docket No. 74-1517

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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REPLY BRIEF FOR APPELLANT

In his brief on appeal appellant urges that a reversal of the conviction is required because the government failed to make the Allen letters available to defense counsel. Moreover, appellant argued that reversal is necessary because the goverment's failure to fulfill its obligations under 18 U.S.C. §3500 et seq. was compounded by Judge Carter's neglect to give to defense counsel the Allen letter in his possession and to inform counsel of his ex parte communications with the United State's Attorney's office.

The government argues that remand is necessary to settle three alleged factual disputes (government's brief at 14-15). No such disputes exist. All facts pertinent to the

resolution of the Allen letters issue are presently and properly before this Court.

The government falsely contends that one material fact at issue is the time when Allen agreed to cooperate with the government (Government's brief at 14.).

The exact sequence of events in the relationship between Allen and the government is irrelevant to the determination of whether reversal is required. The only factor of importance is that the letters should have been turned over to defense counsel so that counsel could have determined whether Allen was subject to pressure or whether Allen was deranged or a liar.

The government next makes the disingenuous argument that "there is no record as to whether trial counsel had the controverted letters in his possession at the trial of Yagid." (Governments brief at 14.) Under 18 U.S.C. §3500 et seq. the government has a continuous obligation to make available exculpatory material. The burden is clearly on the government to prove that it has complied with this statutory obligation. The record reveals that the letters were never turned over. The government even now does not claim to have satisfied its duty. The government's argument is a subterfuge, for it knows that the letters were not given to

defense counsel.*

The last contention is that "there is no record as to the circumstances under which any letter was written nor the extent to which any letter relates to the case in which Yagid was tried before Judge Carter." (Government's brief at 14). Clearly, the "circumstances" of the letters are irrelevant; the letters speak eloquently for themselves. Moreover, the importance of the letters is uncontrovertible. Allen had critical knowledge concerning whether appellant was entrapped by Olsberg. In fact, Allen was the only witness to corroborate Olsberg's version of the formation of the conspiracy. Defense counsel undoubtedly would have made the letters the cornerstone of his attack on Allen's credibility.

In sum, the government, rather than confessing its blatant error, seeks to avoid the judgment of this Court by fabricating false factual disputes, hoping to obtain a remand for a hearing in the District Court. The government would

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*Moreover, trial counsel represented to me that he never was informed about the letters. Also, counsel's cross examination of Allen demonstrates that he did not have the letters during cross examination (See appellant's brief, footnote at 15).

waste the time of this Court, of the District Court on remand, and possibly of this Court again on a second appeal of this issue when, in truth, no meaningful factual dispute exists. Identical to the situation in United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974), all significant facts requiring remand are presently before this Court.* The full text of the letters are before this Court, as well as the facts that letter three was sent to Assistant United States Attorney Michael Eberhardt, counsel for the government in this case, that letter two was sent to Judge Carter and was called to the attention of United States Attorney Paul J. Curran, and that the other letters were in the possession of Assistant United States Attorney Ira Sorkin, counsel for the government in other cases involving Allen. Without doubt, these letters should have been given to defense counsel. The government's failure to do so requires a reversal of appellant's conviction.

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*The government's cases (government's brief at 15) in support of its position that this issue should be remanded for a hearing are inapposite. In Campbell v. United States, 365 U.S. 85 (1961), the issue before the Supreme Court was whether an F.B.I. interview report was 3500 material. Remand was required, because, unlike here, the report had not yet been seen by defense counsel, the Court of Appeals, or the Supreme Court. The same situation, inability of an appellate court to order a new trial because the allegedly wrongfully withheld material was not before the court, existed in United States v. Brawer, 482 F.2d 117 (2d Cir. 1973); on remand at 367 F. Supp. 156 (S.D.N.Y. 1973), affirmed in slip op. 5735 (2d Cir. May 3, 1974). See also, United States v. Addonizio, 449 F.2d 100 (3rd Cir. 1971); Lloyd v. United States, 412 F.2d 1084 (5th Cir. 1969).

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the judgment below should be reversed and the case be remanded for a new trial.

Respectfully submitted,

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